# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

HARBORLITE CORPORATION

and Case 27-CA-21386

**TEAMSTERS LOCAL UNION NO. 455** 

Michael Cooperman, Esq., for the General Counsel.

Michael J. Belo, Esq., (Berenbaum & Weinshienk, P.C.), of Denver, Colorado, for the Union.

J. Thomas Kilpatrick and Jeremy Tucker, Esqs., (Alston & Bird LLP) of Atlanta, Georgia, for the Respondent.

## **DECISION**

## Statement of the Case

**WILLIAM G. KOCOL**, Administrative Law Judge. This case was tried in Alamosa, Colorado, on January 20, 2010. The charge and amended charge were filed October 13 and December 9, 2009,¹ respectively, by Teamsters Local Union No. 455 (herein the Union) and the complaint was issued December 22. The complaint alleges that Harborlite Corporation (herein Harborlite or Respondent) violated Sections 8(a)(1) and (3) of the Act by threatening to lock out employees and permanently replace them and thereafter locking out employees. Harborlite filed a timely answer that admitted the allegations of the complaint concerning the filing and services of the charge and amended charge, jurisdiction, labor organization status, and supervisory and agency status.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Harborlite, I make the following.

# Findings of Fact

#### I. Jurisdiction

Harborlite, a corporation, is engaged in the operation of a perlite mine located in No Agua, New Mexico, and has a warehouse and office facility in Antonito, Colorado, where it annually ships goods and materials values in excess of \$50,000 directly to points located

<sup>&</sup>lt;sup>1</sup> All dates are in 2009 unless otherwise indicated.

outside the State of Colorado. Harborlite admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

# II. Alleged Unfair Labor Practices

## A. Facts

The main issue underlying this case is whether an employer can permanently replace employees that it has locked out.

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As indicated, Harborlite maintains a warehouse and office facilities in Antonito, Colorado, and a perlite mining location in No Agua, New Mexico. The Antonito plant consists of three structures: the office complex, the garage, and the loading station. Harborlite is owned by its parent company, World Minerals, which is, in turn, owned by Imerys. The Union represents a bargaining unit composed of about 29 Harborlite employees from the production, maintenance and shipping\_departments at the Antonito facility and the No Agua mine. The most recent collective bargaining agreement between the Union and Harborlite began on July 1, 2006 and ended on June 30, 2009. The agreement was subsequently extended through August 23. Following the expiration of the most recent contract, the unit employees continued to work for Harborlite without a contract in place.

From June 30 through the end of August, the Union and Harborlite participated in approximately eight bargaining sessions. James Adams, the business agent and vice president for Teamsters Local 455, acted as the chief negotiator for the Union in this matter. Harborlite's bargaining teams was lead by J. Thomas Kilpatrick, its attorney, and Chris Bloyer, labor relations manager; Paul Sowards, the plant manager at Harborlite's facilities in Antonito and No Agua, also participated as a member of Harborlite's bargaining committee.

On August 21 Respondent submitted its last, best and final offer to the Union. On August 23 the union membership voted to reject Harborlite's final contract proposal and continued to work without a contract. On September 17 Harborlite sent the Union a letter that stated, in pertinent part:

As you recall, we entered into a gentlemen's agreement that neither party would resort to economic actions, i.e., strike or lockout, without notifying the other party. The company hereby terminates any such agreement and notifies you that it is considering a lawful lockout of employees in support of this bargaining position.

On September 30 Harborlite sent the Union a message confirming that the parties would meet again on October 6 and 7. Harborlite's message continued:

Please be advised that if an agreement is not reached by 7:00 PM Mountain Time on Wednesday, October 7<sup>th</sup>, the Company will exercise its legal right to lock out employees beginning with the night shift, 11:00 PM Wednesday night. Further, the Company will immediately begin hiring permanent replacements for the locked out employees.

On October 6, 2009, the Union and Harborlite's respective negotiating committees reconvened for another bargaining session. The Union's bargaining committee included two unit employees. The Union presented Harborlite with a single proposal regarding overtime. After several hours of consideration, Harborlite rejected this proposal and restated its "last, best

and final offer." Harborlite did not make any new proposals at this meeting. Harborlite asked the Union to present its proposal to the union members again, and suggested another meeting between both parties on October 7, 2009. Bloyer advised the union negotiating committee that they had until 11:00 p.m. the following day to ratify Harborlite's proposal. Bloyer stated that if the unit employees did not accept Harborlite's proposed contract Harborlite would "lock out and permanently replace" the employees.

On October 7, 2009, Adams met with the membership at the Antonito plant and at the No Agua mine to discuss Harborlite's proposal. The membership again rejected the offer. Later that day, Adams, accompanied by the negotiating team including the two unit employees, met with Harborlite. Adams informed Harborlite of the members' decision to reject its offer, and Harborlite reaffirmed that, as a result, it would begin to hire permanent replacements on October 8, 2009.

On the very same day at roughly 5:00 p.m., Harborlite plant manager Paul Sowards had a conversation with Harborlite employees Jess Blea and Arthur Martinez. Both Blea and Martinez were at the loading station when Sowards approached them and noticed a picketing schedule that the Union had given them. Sowards asked what the schedule was, and Blea explained that it was a picketing schedule. Sowards urged both employees to reconsider the contract, explaining that the timing was not right due to the economy and the fact that Harborlite was not making money. Sowards advised the employees to "pick a fight that they could win and not lose", that Harborlite had two high-priced attorneys and that the Union could not win even if it filed charges against Harborlite. Martinez then asked what was going to happen next and Sowards said that they would be permanently replaced.<sup>2</sup>

Also on the same day, October 7, Harborlite sent the Union a letter that read in pertinent part:

This is to advise you that the Company is exercising its legal right to lock out all bargaining unit employees at the Company's Antonito and No Agua facilities in support of its bargaining demands. All such employees are locked out as of 11:00 PM, Wednesday, October 07, 2009. Current employees who report to work will be told that no work is available to them until an agreement is reached on a collective bargaining agreement.

The facilities will continue to operate using supervisory and replacement employees. Beginning Monday, October 12, 2009, we will begin hiring permanent replacements for the locked out employees. Any employees who are permanently replaced will be afforded all of their legal rights under the national Labor Relations Act and other applicable laws....

The lockout will end upon acceptance of the Company's last, best, and final offer. Such action will let us all get back to the main goal of assuring the viability if (sic) the Antonito and No Aqua operations.

Effective October 7 at 11 p.m., Harborlite locked out all bargaining unit employees and the next day gave them a letter explaining them that they were being locked out and that "Beginning Monday, October 12, 2009, we begin hiring permanent replacements for locked out employees."

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<sup>&</sup>lt;sup>2</sup> These facts are based on a composite of the credible testimony of Blea, Martinez, and Sowards.

On October 14 Harborlite sent the Union the following letter.

As you know, the Company has begun the process of hiring replacements for the locked out employees. We will continue that process and will hire replacements for all locked out employees. As a gesture of good will, we have decided to make the replacements temporary until further notice. Although we believe that we have the right to hire permanent replacements, we will refrain from doing so in an effort to show that the Company is being more than reasonable. We hope this encourages the membership to accept the terms of our last, best and final offer. Such action will end the lockout, bring the locked out employees back to work, and allow us to get back to meeting our goal of assuring the long term viability of the Antonito and No Agua facilities.

Harborlite did not send this letter to employees; the employees instead learned of the letter from the Union sometime in mid November.

John Lewis is Vice President of the International Chemical Workers Union Council/UFCW. That Union represents some employees in an enterprise related to Harborlite. Lewis urged Harborlite to ends its lockout of the employees involved in this case. On January 12, 2010, Harborlite informed the Union that it was ending the lockout explaining:

[Lewis] is well respected by our management team and we value his opinions and suggestions. We have carefully considered [Lewis's] request. As we have stated numerous times, we desire a cooperative relationship with our employees and their representatives. In our current situation, the locked out employees have conducted themselves professionally. In light of these two considerations, and as a demonstration of our continued good will and desire to resolve the dispute, we are ending the lockout effective immediately. Hopefully, this will lead to a mutually satisfactory resolution of the dispute and the continuation of a good relationship between the Company and the Union.

On January 16, 2010, all bargaining unit employees returned to work.

## B. Analysis

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An employer may lock out employees in support of its bargaining position and hire employees to temporarily replace the locked out employees until the lock out ends. *Harter Equipment*, 280 NLRB 597 (1986), affd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987). The question presented in this case is whether an employer may hire permanent replacements<sup>3</sup> for the locked out employees who would continue to work for the employer even after the lock out ends. In *Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997), enf. denied *NLRB v. Ancor Concepts*, 166 F.3d 55 (2<sup>nd</sup> Cir. 1999), the Board stated "An employer's use of *permanent* replacements is inconsistent with a declared lawful lockout in support of its position." In the footnote supporting this proposition the Board stated:

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<sup>&</sup>lt;sup>3</sup> Permanently replaced employees differ from discharged employees because permanently replaced employees have certain rights to be recalled to their old jobs once their permanent replacements leave the employment of the employer. *Laidlaw Corp.*, 171 NLRB 1366, enfd. 414 F.2d 99 (7<sup>th</sup> Cir. 1969), cert. denied 397 U.S. 920 (1970).

See *Harter Equipment (Harter II)*, 293 NLRB 647, 648 (1989), in which the Board relied on the on the fact the locked-out employees were not strikers and therefore could not be permanently replaced to find that they were entitled to vote in a decertification election. See also Justice Goldberg's concurring opinion in *Brown Food Store*, 380 U.S. 278, 293 (1965), in which he expressed "grave doubts as to whether the act of locking out employees and hiring permanent replacements is justified by any legitimate interest of the nonstruck employers."

More recently in *Bud Antle*, 347 NLRB 87, 89 (2006), the Board stated "It is well-settled that locked out employees cannot be permanently replaced." This language makes clear that an employer may not lawfully permanently replace its locked out employees. Harborlite argues that this language is mere dicta that I am free to disregard, but it is clear that the Board does not consider the issue as still in doubt.

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Moreover, even if I were to disregard Board statements on the use of permanent replacements for locked-out employees, I would nonetheless conclude that such use is unlawful. This is so because the Board is charged with the initial responsibility of interpreting and applying the Act in a manner that considers the balance of economic resources available to labor organizations and employers during the collective bargaining process so as not to undermine the specific language of the Act. Section 7, the "heart" of the Act, explicitly guarantees employees the right to attempt to improve their working conditions through collective bargaining. Allowing employers to lock out employees and then permanently replace them would seriously undermine this Section 7 right. After all, while being permanently replaced is different than being discharged, the difference is often more legalistic than real for those workers who are permanently replaced. In apparent recognition of consequence of allowing employers to lock out and then permanently replace workers, I have been unable to find any Board case to support Harborlite's position in favor of permanent replacement. Put differently, in the over 75 years of the Act's existence, no Board or Supreme Court precedent has supported Harborlite's position. And there is no evidence in this record of changed circumstances that would justify providing employers with an additional powerful weapon for use during collective bargaining at the expense of the Section 7 rights. Harborlite relies heavily on International Paper Co. v. NLRB, 115 F. 3d 1045 (D.C. Cir. 1997). But that case involved a situation where an employer permanently subcontracted unit work, and that matter was a subject of discussion between the union and employer at the bargaining table. In any event, I am bound to apply Board law in the absence of clear Supreme Court precedent to the contrary. I therefore conclude that the Act does not allow an employer to permanently replace workers that it has locked out.

I now address the specific allegations of the complaint. The complaint alleges that on or about October 6 Bloyer threatened to lock out and permanently replace its unit employees. I have concluded above that Bloyer did, in fact, state in the presence of unit employees that Harborlite would lock out and permanently replace the unit employees. Just as it is unlawful to threaten to permanently replace unfair labor practice strikers, *United States Service Industries*, 319 NLRB 231, 233 (1995), it follows by threatening to lock out and permanently replace employees unless the Union acceded to its bargaining demands, Harborlite violated Section 8(a)(1). See, for persuasive value, *Wayneview Care Center*, 352 NLRB 1089, 1105, 1089 fn. 2 (2008). The complaint alleges that on October 7 Sowards made a similar unlawful statement. I have concluded above that he did so. By doing so Harborlite again violated Section 8(a)(1). Finally, the complaint alleges that on October 8 Boyer notified employees that Harborlite was locking them out and would begin to hire permanent replacements. This allegation too is supported by the evidence; Harborlite again violated Section 8(a)(1). In making these finding I have considered the fact that on October 14 Harborlite informed the Union that it would not hire

permanent replacements. In doing so, however, Harborlite reiterated its right to do so. This does not undo the effects of its earlier unlawful threats. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The complaint alleges that the conduct described in this paragraph also violated Section 8(a)(3) of the Act, but this contention is unsupportable and I dismiss this allegation.

Pointing to *Eads Transfer*, 304 NLRB 711 (1991), *Ancor Concepts*, supra, the General Counsel contends that the lockout itself was unlawful. In *Ancor Concepts* the Board stated:

Following the declaration of a lawful lockout, an employer that seeks to continue to invoke *Harter I* to justify its failure to reinstate striking employees on their unconditional offer to return to work must refrain from engaging in conduct inconsistent with an economic lockout. Such inconsistent conduct ends the lawful lockout and removes the employer's privilege of invoking *Harter I*.

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In the instant case, the Respondent's counsel informed the Union by letter dated November 29 that the replacements were permanent employees. An employer's use of *permanent* replacements is inconsistent with a declared lawful lockout in support of its bargaining position.[footnote omitted].

Ancor Concepts, supra at 744. The Board concluded that the lawful lockout ended in that case when the respondent informed the union that the replacements were permanent; the Board ordered backpay for the employees beginning November 29, the date the lock out no longer was lawful. See also Eads Transfer, supra. Applying that reasoning to this case, it follows that when Harborlite unlawfully threatened that it would permanent replace the employees it locked out, what otherwise might have been a lawful lock out became unlawful. In this case the unlawful conduct preceded the lock out and the lockout therefore was unlawful at its inception.

In its brief, Harborlite argues that its threats to permanently replace the employees it was locking out did not have any adverse impact on employee rights. It argues that these threats would only increase the likelihood that the Union and the unit employees would accede to its bargaining demands and resolve the bargaining impasse. But this argument ignores the fact that these unlawful threats complicated the bargaining process by inserting an issue (permanent replacement of locked out employees) that required resolution through the litigation process before Harborlite and the Union could return to the bargaining table in an atmosphere clear of the unlawful threats. Put differently, the employees' right to support the Union in its bargaining position and to resist Harborlite's bargaining demands was significantly undermined by Harborlite's unlawful threats. As the Union points out in its brief, the Board in Globe Business Furniture, 290 NLRB 841, fn. 2 (1988) considered preceding unfair labor practices committed by an employer in holding that the employer's lock out violated Section 8(a()3). Harborlite relies on the Court's decision in NLRB v. Ancor Concepts, supra, but as indicated I am bound to follow Board law in the absence of clear Supreme Court precedence. By locking out employees after threatening that it would permanently replace the locked out employees, Harborlite violated Section 8(a)(3) and (1).

#### Conclusions of Law

1. By threatening to lock out and permanently replace employees unless the Union acceded to its bargaining demands, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By locking out employees after threatening that it would permanently replace the locked out employees, the Respondent violated Section 8(a)(3) and (1) and Section 2(6) and (7).

5 Remedy

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Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily locked out employees, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from October 7, 2009 until January 16, 2010, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.<sup>4</sup>

#### ORDER

The Respondent, Harborlite Corporation, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from:
- (a) Threatening to lock out and permanently replace employees unless the Union acceded to its bargaining demands.
- (b) Locking out employees after threatening to permanently replace the locked out employees
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
  - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Make the locked out employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
- (b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

 <sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its facilities in No Agua, New Mexico, and Antonito, Colorado, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to [employees] [members] [employees and members] are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 7, 2009

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(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., March 8, 2010.

William G. Kocol
Administrative Law Judge

<sup>&</sup>lt;sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## **APPENDIX**

## NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT threaten to permanently replace employees who we lock out.

WE WILL NOT lock out employees after threatening to permanently replace the locked out employees

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL WE WILL make the employees that we locked out whole for any loss of earnings and other benefits resulting from their lock out, less any net interim earnings, plus interest.

		Harborlite Corporation (Employer)	
Dated			
	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

600 17th Street, 7th Floor, North Tower Denver, Colorado 80202-5433 Hours: 8:30 a.m. to 5 p.m. 303-844-3551.

# THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 303-844-6647.